FILED BY CLERK
JUL - 7 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. THOMAS BERNARDO GRANILLO, Appellant.	2 CA-CR 2006-0343 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054476

Honorable Charles S. Sabalos, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Thomas Granillo was convicted of armed robbery, aggravated assault with a deadly weapon, aggravated assault of a minor under fifteen years of age, and possession of a deadly weapon by a prohibited possessor. On appeal, he contends the trial court erred in denying his pretrial motion to preclude the victim's in-court identification of him, denying his motion to suppress evidence of a handgun holster and bullets found by police during a search of his residence, and in sentencing him under Arizona's dangerous-crimes-against-children statute, A.R.S. § 13-604.01. For the reasons below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *See State v. Cruz*, 218 Ariz. 149, n.1, 181 P.3d 196, 202 n.1 (2008). In October 2005, Z. and her three-year-old son returned to their apartment complex from a shopping trip. As they walked to the apartment door, Granillo approached them from behind and placed a gun against the back of Z.'s head. He told Z. he would kill her if she screamed, and he forced her and her son into the apartment.

¶3 Once inside, Z. saw Granillo's face and realized she knew him. She asked: "Bernie . . . why [are you] doing this?"[1] Granillo responded: "Don't say my name, you don't know me." He then pointed his gun at Z., ordered her and her son into her son's

[1]Granillo's middle name is Bernard, and there was testimony at trial indicating he was commonly referred to as "Bernie."

bedroom, and went into the master bedroom and took several items from the closet, including a handgun and a box of Z.'s boyfriend's colognes. As Granillo left the apartment, he threatened to hurt Z. if she called the police.

¶4 After she saw Granillo drive away, Z. called 911 and told the dispatcher she had been robbed by "Bernie." Shortly thereafter, Tucson police officer Del Principe responded to Z.'s apartment. Z. stated she had been robbed by "Bernie Granillo," and gave a physical description of him. Ten days later, Z. was interviewed by Tucson police detective Carroll, who showed her a photograph of Granillo from his Motor Vehicle Division records that had been folded to conceal his name. Z. identified him as the assailant and Granillo was arrested later that day.

¶5 In November, Granillo was charged and subsequently convicted as outlined above. He was sentenced to a combination of consecutive and concurrent prison terms totaling 21.5 years. This appeal followed.

In-Court Identification

¶6 Before trial, Granillo filed a motion to preclude Z. from identifying him during the trial as the assailant, claiming the out-of-court identification procedure had been unduly suggestive and her in-court identification, therefore, would be unreliable. After a hearing held pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), the trial court denied the motion. Granillo now challenges the court's ruling, which we review for a clear abuse of discretion. *See State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002).

¶7 Prior to trial, Z. identified Granillo as the assailant from a single photograph provided by the police. We agree with Granillo that this identification procedure was unduly suggestive. *See State v. Canez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002) ("Single person identifications are inherently suggestive."). Even if an out-of-court identification procedure was unduly suggestive, however, an in-court identification is admissible if it has not been tainted by the out-of-court identification; that is, "if, in view of the totality of the circumstances, the in-court identification is reliable." *State v. Schilleman*, 125 Ariz. 294, 297, 609 P.2d 564, 567 (1980).

¶8 At the *Dessureault* hearing, Z. testified she recognized Granillo "when he first came into [her] apartment." She stated she knew Granillo because they had attended middle school together, they lived in the same neighborhood, and she had seen him at several events in their neighborhood, including several softball games only months before the incident. Moreover, she testified that Granillo's brother had married her cousin and that she had seen Granillo at several family functions—most recently, they had both attended his niece's birthday party. She stated she had been certain that Granillo had been the assailant "[b]efore Detective Carroll showed [her] that first photograph." She also testified that, during the robbery, she had called Granillo by his name and he had responded, "Don't call me by my name." We have repeatedly found in-court identifications admissible, even following unduly suggestive out-of-court identification procedures, when there is an independent basis for the in-court identification, such as a personal relationship between the

witness and the defendant. *See State v. Gretzler*, 126 Ariz. 60, 74, 612 P.2d 1023, 1037 (1980); *State v. LaBarre*, 114 Ariz. 440, 447, 561 P.2d 764, 771 (App. 1977). In this case, Z. clearly "knew [Granillo] well enough to make an in-court identification that was untainted by the prior photo identification." *State v. Bojorquez*, 111 Ariz. 549, 556, 535 P.2d 6, 13 (1975). Accordingly, the court did not abuse its discretion in permitting the identification. *See Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183.

Admission of Evidence

¶9 The day after Granillo was arrested, police officers searched his home and in his bedroom found, among other things, forty-two bullets and a holster for a handgun. Prior to trial, Granillo moved to preclude this evidence on the ground it was irrelevant because there was nothing to connect those items to the gun used during the robbery. The court initially granted the motion, but, following the state's motion for reconsideration, reversed its earlier ruling and admitted the evidence. Granillo contends the court erred in doing so, a decision we review for an abuse of discretion. *See State v. McCurdy*, 216 Ariz. 567, ¶ 6, 169 P.3d 931, 935 (App. 2007).

¶10 Granillo contends evidence of the holster and bullets was "not relevant to the issue of whether [he] committed the assault" because they were never connected to the gun used during the robbery. He cites several cases from other jurisdictions for the proposition that "'evidence of possession of a weapon not used in the crime charged . . . leads logically only to an inference that the defendant is the kind of person who surrounds himself with

deadly weapons—a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant.'" *People v. Archer*, 82 Cal. App. 4th 1380, 1392 (2000), *quoting People v. Henderson*, 58 Cal. App. 3d 349, 360 (1976).

¶11 We agree that, generally, evidence of a weapon that has not been connected to the crime with which the defendant has been charged is irrelevant. *See State v. Poland*, 132 Ariz. 269, 281, 645 P.2d 784, 796 (1982); *see generally State v. Mead*, 120 Ariz. 108, 111, 584 P.2d 572, 575 (App. 1978). Here, however, in addition to assault and robbery, Granillo was charged with possession of a weapon by a prohibited possessor. Thus, Granillo's possession of a holster and ammunition was relevant evidence—the holster and ammunition found in his room made it more likely that Granillo in fact possessed a handgun, *see* Rule 401, Ariz. R. Evid., which was a crime in itself for Granillo, regardless of whether that gun was used to commit the assault and robbery. *See* A.R.S. § 13-3102(A)(4). We cannot say the trial court erred in finding this evidence more probative than prejudicial, *see Canez*, 202 Ariz. 133, ¶ 61, 42 P.3d at 584 ("trial court is best situated to conduct the Rule 403 balance, we will reverse its ruling only for abuse of discretion"). We therefore find no error in its decision to admit the evidence. *See McCurdy*, 216 Ariz. 567, ¶ 6, 169 P.3d at 935.

A.R.S. § 13-604.01(D)

¶12 Section 13-604.01, A.R.S., "requires enhanced penalties for persons convicted of a 'dangerous crime against children.'" *State v. Sepahi*, 206 Ariz. 321, ¶ 7, 78 P.3d 732,

733 (2003). Under that statute, a person commits a "dangerous crime against children" by committing, *inter alia*, an aggravated assault against a minor under fifteen years of age that involves the "use or threatening exhibition of a deadly weapon or dangerous instrument." A.R.S. § 13-604.01(N)(1)(b).

¶13 During trial, Z. testified Granillo had pointed his gun at her three-year-old son and "put the gun to his head," and Granillo was convicted of aggravated assault against a minor under the age of fifteen. Granillo does not contest these facts, but he argues § 13-604.01 should not apply because "he was not a 'predator' who posed 'a direct and continuing threat to the children of Arizona,'" and because "the age of anyone present" during the assault "was incidental to him." Whether the trial court correctly applied § 13-604.01 is a legal question we review *de novo*. *See Sepahi*, 206 Ariz. 321, ¶ 2, 78 P.3d at 732.

¶14 Granillo's argument is based on our supreme court's decision in *State v. Williams*, 175 Ariz. 98, 99, 854 P.2d 131, 132 (1993), wherein an intoxicated truck driver collided with a station wagon, severely injuring a fourteen-year-old passenger in the sation wagon. The supreme court found the trial court had erred in sentencing Williams under § 13-604.01, noting "that the legislature, in enacting § 13-604.01, was attempting to respond effectively to those predators who pose a direct and continuing threat to the children of Arizona." *Id.* at 102, 854 P.2d at 135. The court found Williams had "not prey[ed] upon helpless children but [had] fortuitously injure[d a] child[] by [his] unfocused conduct." *Id.*

at 103, 854 P.2d at 136. For the statute to be applicable, the court stated, "the defendant's conduct must be focused on, directed against, aimed at, or target a victim under the age of fifteen." *Id.*

¶15 In *Sepahi*, 206 Ariz. 321, ¶ 16, 78 P.3d at 735, the supreme court clarified its holding in *Williams*, stating:

> While, as *Williams* holds, the phrase "committed against a minor under fifteen years of age" can naturally and logically be read as requiring targeting of a child, it stretches that statutory language beyond ordinary bounds to read it as also necessitating proof of some sort of special continuing dangerous status on the part of the defendant. While the legislature could have rationally passed such a statute, it did not do so, and we cannot rewrite the statute to reach such a result.

The court further stated: "in order to prove that a defendant has committed a dangerous crime against a child, the State must prove that the defendant committed one of the statutorily enumerated crimes and that his conduct was 'focused on, directed against, aimed at, or target[ed] a victim under the age of fifteen.'" *Id.* ¶ 19, *quoting Williams*, 175 Ariz. at 103, 854 P.2d at 136.

¶16 It is uncontested that Granillo committed one of the statutorily enumerated crimes. By pointing his gun at Z.'s three-year-old son and then placing the gun to the child's head, Granillo's conduct clearly involved the "threatening exhibition of a deadly weapon," § 13-604.01(N)(1)(b), and was "'focused on, directed against,'" or "'aimed at'" a victim under the age of fifteen. *Sepahi*, 206 Ariz. 321, ¶ 16, 78 P.3d at 735, *quoting Williams*, 175 Ariz. at 103, 854 P.2d at 136. Contrary to Granillo's assertion, nothing more

is required for the statute to apply. *See Sepahi*, 206 Ariz. 321, ¶ 16, 78 P.3d at 735. Accordingly, the trial court did not err by sentencing Granillo pursuant to § 13-604.01. *See id.*

Disposition

¶17 Granillo's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge